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In The
Supreme Court of the United States

ANGELA PERRY and MICHAEL GREEN,
Petitioners,

v.

MAV MIRFASIHI, on behalf of himself and all others similarly situated, and FLEET MORTGAGE CORP.,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
for the Seventh Circuit

PLAINTIFF-RESPONDENT MIRFASIHI'S BRIEF IN OPPOSITION

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INTRODUCTION

Plaintiff-respondent Mav Mirfasihi, on behalf of himself and all others similarly situated, respectfully submits that this Court should deny the petition of Angela Perry and Michael Green, objectors to a class action settlement.

After thorough scrutiny, the district court approved a revised class action settlement. On appeal, the Seventh Circuit remanded for additional scrutiny on one limited issue. The district court followed the Seventh Circuit's instructions, scrutinized the issue that the Seventh Circuit had identified, and re-approved the revised settlement. The objectors then appealed the approval again. On appeal, the Seventh Circuit affirmed the trial court's second approval of the revised settlement. The objectors now petition for a writ of certiorari, arguing that the Seventh Circuit erred with respect to plaintiff's claims under the Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq.* ("FCRA").

The petitioners make two principal errors, either of which is dispositive without this Court's intervention.

First, the Seventh Circuit ruled that the objectors *waived* their FCRA objection by not raising it in the district court before appealing the first approval of the revised settlement. Only secondarily, in dictum, did the Seventh Circuit

address the merits of the petitioners' FCRA objection. Yet the petitioners identify only a single question for review: whether the Seventh Circuit's alternative language with respect to the merits of the FCRA claims was correct. As a result, even if this Court were to reverse on the sole question presented, it would not change the result.

Second, the petitioners repeatedly contend that respondent Fleet Mortgage Corporation furnished information to telemarketers "based on sources other than its own experience," Pet. 1; "not based solely on Fleet Mortgage's relationship with the customer," Pet. 4; and "obtained from sources other than its own experience," Pet 7. Nothing in the record supports these assertions, which provide the entire basis for petitioners' FCRA objection that the settlement should not have been approved.

This is an unremarkable case with no important issues to decide. It involves a class-action settlement that received intense and repeated scrutiny and supervision by the trial court and the Court of Appeals. Petitioners try to make their FCRA argument *seem* important by distorting the factual record and case history, and by failing to highlight that the Seventh Circuit decided first and foremost that petitioners waived their objection based on the FCRA many years ago. The petition should be denied.

OPINIONS BELOW

The reported opinions of the United States Court of Appeals for the Seventh Circuit are at 551 F.3d 682 (7th Cir. 2008) (affirming second approval of revised settlement); 450 F.3d 745 (7th Cir. 2006) (remanding first approval of revised settlement for further consideration of limited issue of state law); and 356 F.3d 781 (7th Cir. 2004) (reversing approval of original settlement).

The reported opinions of the United States District Court for the Northern District of Illinois are at 2007 U.S. Dist. Lexis 65906 (N.D. Ill. 2007) (awarding fees to the petitioners and reducing the award "by half to account for the burden that the objectors have placed on all parties involved"); 2007 U.S. Dist. Lexis 51474 (N.D. Ill. 2007) (approving revised settlement for second time); and 2005 U.S. Dist. Lexis 16701 (N.D. Ill. 2005) (approving revised settlement for first time, later "incorporate[d] by reference" into the district court's second approval at 2007 U.S. Dist. Lexis 51474 (N.D. Ill. 2007)).

Earlier reported opinions of the district court that are less relevant to this petition are at 2004 U.S. Dist. Lexis 23460 (N.D. Ill. 2004) (allowing petitioners to intervene) and 2002 U.S. Dist. Lexis 27113 (N.D. Ill. 2002) (approving original settlement).

STATEMENT OF THE CASE

In this matter, two objectors seek re-review of a class action settlement that has already received intense scrutiny and supervision multiple times by the district court and Seventh Circuit. The settlement itself (the "revised" settlement) is the result of a renegotiation of an earlier settlement (the "original" settlement") that also received intense scrutiny by the Seventh Circuit and was overturned. When the parties agreed to the revised settlement and the district court approved it twice, they had the benefit of detailed guidance from the Seventh Circuit, which they rigorously followed to the Seventh Circuit's satisfaction.

The case involves a mortgage company, Fleet Mortgage Corporation, that ceased its existence in June 2001. Plaintiff alleges that, prior to that time, Fleet improperly sold the names and mortgage account numbers of its mortgage customers to several telemarketers for an amount that plaintiff later determined to be $243,000. Plaintiff alleges that Fleet then participated with those telemarketers in deceptive telemarketing practices that resulted in unauthorized charges being assessed on some customers' mortgage statements.

I. The Original Settlement

After several rounds of motions to dismiss, the parties decided to enter into settlement discussions,

exchanged relevant documents and information, and ultimately entered into the original settlement agreement. On July 31, 2002, they filed it with the district court. The agreement, by its terms, included the disposition of three similar cases that were pending in state courts in Minnesota, Maryland, and Wisconsin.

The original settlement involved two classes: an "information-sharing" class comprised of about 1.4 million members whose names Fleet had provided to the telemarketers; and a "telemarketing" class, comprised of about 190,000 members who were billed for telemarketed products or services. The telemarketing class is a subset of the information-sharing class.

Based on an evaluation that the claims of the information-sharing class were subject to a number of difficult factual and legal hurdles, the original settlement of these claims provided for full disgorgement of all of the revenue ($243,000) that Fleet had received for sharing its information with telemarketers. As a practical matter, no direct payment could be made directly to the members of the information-sharing class because the total amount to be disgorged would have amounted to less than 20¢ per person if divided among class members.

The original settlement of the claims of the telemarketing class involved a claims procedure

whereby claimants could obtain certain levels of relief up to a total of $2.4 million for this class.

Over the petitioners' objections, the district court approved the original settlement. The petitioners appealed. The Seventh Circuit reversed, listing a number of specific factors that the parties and the district court needed to take into account, analyze, and articulate before the settlement could be approved. *See Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781 (7th Cir. 2004) ("*Mirfasihi I*"). Among other points, the Seventh Circuit indicated a preference for having separate counsel represent the information-sharing and telemarketing classes. *Id.* at 785.

II. The Revised Settlement

Following remand, the would-be class representatives of the telemarketing class brought in new counsel that had not participated in the original settlement. Thereafter, the previous counsel devoted their attention solely to the information-sharing claims.

The parties then evaluated whether to continue litigating or first attempt to negotiate a different settlement. They elected the latter course. After face-to-face negotiations, the efforts of a settlement judge, and finally mediation before a retired judge, the parties agreed to a revised

settlement, which on May 31, 2005 they presented to the district court for approval.

The revised settlement involved re-certification of the same two classes as the original settlement: an information-sharing class and a telemarketing class. The relief, however, was different. Under the revised settlement, as under the original settlement, the consideration for settling the information-sharing claims was Fleet's disgorgement of the full amount, $243,000, that Fleet received for sharing the names of its mortgagors. But unlike the original settlement, the funds that Fleet disgorged would not be used to pay the telemarketing claims. Also, there would be no reversion to Fleet of unclaimed settlement funds, which instead would be paid to a non-profit organization devoted to protecting privacy rights.

A. The District Court's First Approval of the Revised Settlement

The parties filed thorough and detailed briefs, declarations, and evidence in the district court in support of the revised settlement. These filings analyzed and addressed each of the concerns that the Seventh Circuit expressed in *Mirfasihi I*.

On June 28, 2005, the petitioners filed multiple objections to the revised settlement. Some of their objections were the same ones that the Seventh Circuit previously rejected in *Mirfasihi I*.

Mirfasihi v. Fleet Mortgage Corp., 2005 U.S. Dist. Lexis 16701, *27 (N.D. Ill. 2005) ("Green and Perry previously raised these objections[;] [t]he Seventh Circuit sustained some ... while rejecting others").

One of the petitioners' principal objections was that Fleet's conduct, as it related to obtaining approval of the original settlement, somehow created a claim for "unfair settlement practices" that were purportedly actionable under Massachusetts consumer protection law. *See* Mass. Gen. L. ch. 93A. The petitioners contended that not only was Fleet's conduct in settling the case actionable but, under Massachusetts law, every one of the 1.4 million members of the proposed information-sharing class was entitled to between $25 and $75 in statutory damages without proof of any harm whatsoever because Fleet had entered into a settlement that had been disapproved on appeal. The petitioners argued that, under their novel theory, their "unfair-settlement-practices" claim was worth up to $105 million to the information-sharing class and therefore the settlement consideration was inadequate. None of the petitioners' objections to the revised settlement in the district court mentioned plaintiffs' FCRA claim or any purported problems with settling that claim based on the consideration provided by the settlement.

All parties, including the petitioners, then briefed each and every one of the petitioners' objections.

On August 11, 2005, the district court issued a 25-page memorandum decision re-certifying the settlement classes, rejecting the petitioners' objections on their merits, and approving the settlement. *Mirfasihi v. Fleet Mortgage Corp.*, 2005 U.S. Dist. Lexis 16701 (N.D. Ill. 2005). After a thorough analysis, the district court ruled that "the claims of the information-sharing class are worth a minimal amount ... In light of the weakness of the information-sharing class's case on its merits, the payment of $243,000 to the Electronic Privacy Information Center is a fair and reasonable settlement of the information-sharing class's claims ... [and] is likely to benefit members of the class in helping to protect their privacy interests." *Id.* at **29-30.

B. The Petitioners' Appeal of the District Court's First Approval of the Revised Settlement

The petitioners appealed virtually every aspect of the district court's approval of the revised settlement, and re-argued numerous objections that the Seventh Circuit had already ruled against in *Mirfasihi I*.

In their appellate briefing, the petitioners cursorily mentioned, for the very first time, an issue concerning the district court's valuation of the information-sharing class's claims under the FCRA.

The petitioners had never raised this issue in the district court.

In the appeal, plaintiff and Fleet had two responses: First, the petitioners had waived their objections concerning settlement of the FCRA claim by not raising them below; and second, the petitioners' FCRA arguments were wrong on their merits. At oral argument, the parties expressly debated the merits of the petitioners' newly raised arguments concerning settlement of plaintiff's FCRA claims.

The Seventh Circuit reversed the district court's approval of the revised settlement. The reversal was not due to any particular problem with the revised settlement but instead related to the Seventh Circuit's view that the district court's analysis had been incomplete in one respect: The district court, in the portion of its 2005 memorandum decision analyzing state consumer protection laws, indicated that it had sampled only four states. (The parties had given the court information on all relevant states' consumer protection laws, but the Seventh Circuit wanted to make sure the district court had analyzed it.) Thus, the Seventh Circuit determined that the district court should perform a more complete analysis of applicable state law. *See Mirfasihi v. Fleet Mortgage Corp.*, 450 F.3d 745, 751 (7th Cir. 2006) ("*Mirfasihi II*"). The Seventh Circuit held:

> [O]n remand, the district court should consider and analyze the full cross-section of potentially applicable **state** law and arrive at a clearer estimate of the potential value of the information-sharing class's claims to allow proper evaluation of the reasonableness of the proposed settlement.

Id. (emphasis added).

In *Mirfasihi II*, the Seventh Circuit noted the FCRA objection, *id.* at 746, but did not write about it separately, accepting the parties' waiver argument and/or merits argument when it rejected all of the petitioners' other complaints. After analyzing certain objections in detail, the Seventh Circuit summarily rejected all of the other objections to the settlement:

> Indeed, the district court properly analyzed (and disposed of) the objectors' other complaints not relating to the information-sharing class's claims evaluation and we need not address these issues here (nor need the district court revisit them upon remand).

Id. at 749 n.1.

C. The District Court's Second Approval of the Revised Settlement

On remand, the district court asked for additional briefing on the sole issue that had been remanded for further consideration. Plaintiff and Fleet each submitted a thorough and comprehensive analysis of all potentially applicable state law as the Seventh Circuit instructed. They each accompanied their briefing with lengthy but easy-to-understand charts citing and quoting applicable state statutes and case law.

The petitioners, on the other hand, submitted a brand new set of objections, uninvited by the district court, "most of which are the same as arguments that they have raised at least once before."[1] *Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. Lexis 51474, *10 (N.D. Ill. 2007); Pet. App. 18-19. For the first time in the district court,

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[1] In a separate decision on the objectors' fees, the district court observed: "They did not provide the court with any additional legal support or analysis for their assertions, however. Instead, in their third set of objections, they apparently lifted text from their second set of objections (their first objections to the second settlement)." *Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. Lexis 65906, *17 (N.D. Ill. 2007). The objectors asked for an award of fees and expenses of $750,000, which was the full amount that the settlement made available for all fees and expenses, but the district court awarded objectors only $18,750, stating in part, "Unfortunately, the court is constrained to conclude that after raising their initial objections and pursuing their first appeal in 2002, ... the intervenors have burdened the court at least as much as they have helped it." *Id.* at **16-17.

the petitioners argued (in a cursory manner) that the FCRA claims were undervalued.

In response, Plaintiff and Fleet argued that the petitioners had long ago waived their FCRA objections by not raising them in the district court prior to *Mirfasihi II*, and that the petitioners were, in any event, wrong on the merits. Plaintiff and Fleet also argued the petitioners' FCRA arguments were outside the scope of the Seventh Circuit's limited remand order.

On July 17, 2007, the district court issued a 14-page memorandum decision approving the revised settlement for a second time. *Mirfasihi v. Fleet Mortgage Corp.*, 2007 U.S. Dist. Lexis 51474 (N.D. Ill. 2007); Pet. App. 12-29. The district court observed: "The intervenors do not challenge the accuracy of the parties' surveys and after careful and thorough review, the court finds them to be accurate, comprehensive, and very helpful and commends FMC and the plaintiffs for their work." Pet. App. 24.

After considering and analyzing the full cross-section of potentially applicable state law, as the Seventh Circuit had directed, the district court determined that the potential value of the information-sharing class's claims was minimal. Pet. App. 29 ("[t]he litigation value of their claims is minimal").

With respect to the petitioners' FCRA objection, which they presented only briefly for the first time in the district court, the district court acknowledged that it did not need to address the objection but did so anyway, overruling it and approving the settlement. The district court incorporated by reference all other holdings of its 25-page 2005 memorandum decision into its 14-page 2007 memorandum decision. Pet. App. 29.

D. The Petitioners' Appeal of the District Court's Second Approval of the Revised Settlement

Apparently disappointed by the amount of fees they were awarded, *see supra* at 12 n.1, the petitioners appealed yet again, asking the Seventh Circuit to review once again the district court's approval of the revised settlement (the petitioners' third appeal).

This time, the petitioners made their FCRA objection central to their appeal. They contended that the district court had made an error in stating that recovery of statutory damages under the FCRA requires actual damages — a brief comment by the district court that none of the parties had suggested and which went beyond the parties' briefing on the FCRA. The petitioners also tried to re-argue most of the other objections they had raised before on appeal, which the Seventh Circuit had already considered and rejected.

On December 30, 2008, in its third detailed opinion on the settlement of this case, the Seventh Circuit affirmed the district court's approval of the revised settlement. *Mirfasihi v. Fleet Mortgage Corp.*, 551 F.3d 682 (7th Cir. 2008) ("*Mirfasihi III*"). *See* Pet. App. 1.

With respect to the petitioners' FCRA argument — which is the only question presented for review in this Court — the Seventh Circuit held as follows: The petitioners had waived this issue long ago, and a party "cannot use the accident of remand as an opportunity to reopen waived issues ..." Pet. App. 5-6 (quoting *United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002), *cert. denied*, 539 U.S. 961 (2003)). The Seventh Circuit elaborated on this point:

> We did not discuss the Act in our second opinion, but implicitly excluded it from further consideration by stating that "on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law." ...
>
> On remand, the district judge nevertheless discussed (and rejected) the applicability of the Act to the class. She should not have wasted her time on the issue. The objectors argue that the scope of the remand was ambiguous; it

> was not; but if the objectors thought it was, or, more plausibly, wanted us to reconsider the scope of the remand, they should have petitioned us for clarification or reconsideration, and they did not.

Pet. App. 6 (emphasis in the original; citations omitted).

The Seventh Circuit went on to give alternative observations, which the Seventh Circuit made clear were in dictum: "**[B]esides** having been forfeited, the claim that Fleet violated the Fair Credit Reporting Act has no possible merit ..." Pet. App. 6.

As for this dictum — i.e., the merits of the FCRA objection — the Seventh Circuit gave two reasons, either of which would have been dispositive.

First, "Fleet ... is not a consumer reporting agency — it is a bank. ... 'The [FCRA] does not impose obligations upon a creditor who merely passes along information concerning particular debts owed to it.'" Pet. App. 7 (quoting *DiGianni v. Stern's*, 26 F.3d 346, 349 (2d Cir.), *cert. denied*, 513 U.S. 897 (1994)).

Second, "What Fleet sold the telemarketers was 'information solely as to transactions between the consumer [the Fleet mortgagor] and the person

making the report [Fleet]," which is excluded from the statutory definition of "consumer reports." Pet. App. 7 (brackets in the original; original ellipsis omitted) (quoting *DiGianni*, 26 F.3d at 349).

The Seventh Circuit ended its third opinion by stating: "This case is *finito*. Affirmed." Pet. App. 11.

E. The Petitioners' Misstatements of the Record

In an effort to get this Court's attention, Petitioners have misrepresented the record in at least the following important respects:

One, petitioners contend that Fleet sold "nonpublic" information to the telemarketers. Pet. 4. Nothing in the record supports this assertion; and the district court expressly held that "the intervenors concede that the information that FMC disclosed about the plaintiffs was already a matter of public record." Pet. App. 21.

Two, petitioners contend that Fleet provided telemarketing firms with specific information including "current loan balances, monthly payments, loan origination dates and loan maturity dates." Pet. 4. There is no support for this assertion in the record.

Three, petitioners contend that Fleet provided to the telemarketers information "that was not based solely on Fleet Mortgage's relationship with the customer." Pet. 4. Similarly, petitioners contend that what Fleet provided "included information about Fleet Mortgage's customers obtained from sources other than its own experience ..." Pet. 7. Petitioners repeat similar assertions in their introduction and throughout their petition as reasons for granting a writ. For example, they contend Fleet "was selling 'consumer reports' within the meaning of the FCRA because those reports contained credit information pre-existing that customer's relationship with Fleet Mortgage ..." Pet. 15. This is a fundamental point in their petition, yet there is absolutely no support for these assertions in the record.

Four, petitioners contend that Fleet provided the telemarketers with a "prescreened list." *E.g.*, Pet. 4, 15. Once again, there is no support for this in the record.

REASONS FOR DENYING THE PETITION

I. The Petitioners Waived Their FCRA Objection by Not Timely Raising it in the District Court

The petitioners waived their FCRA objection and arguments by not timely raising them in the district court before appealing to the Seventh Circuit

the second time. Appellate courts generally review only those issues timely presented to the lower court, and this Court has long recognized and upheld the concept of waiver: "Ordinarily an appellate court does not give consideration to issues not raised below." *Sims v. Apfel*, 530 U.S. 103, 109 (2000) (quoting *Hormel v. Helvering*, 312 U.S. 552, 556 (1941)); *Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) ("[b]ecause this argument was not raised below, it is waived").

As a corollary, an objector to a class-action settlement "will only be allowed to appeal that aspect of the District Court's order that affects him — the District Court's decision to disregard his objections." *Devlin v. Scardelletti*, 536 U.S. 1, 9 (2002). As a result, because the petitioners first raised their FCRA objection and arguments in their appellate briefs in the *Mirfasihi II* appeal (and did so only in a cursory fashion) and had not previously raised this objection in the district court, the Seventh Circuit properly determined that this objection had been waived.

In particular, on May 31, 2005, plaintiff and Fleet filed their revised settlement with the district court. On June 28, 2005, the petitioners filed a multitude of objections. All parties then briefed each and every one of those objections in detail — including three separate briefs from the petitioners detailing all of their objections to the settlement. The petitioners made no objection concerning

settlement of the FCRA claims. As a result, the district court's opinion approving the revised settlement for the first time did not address the FCRA.

Petitioners first raised their FCRA objection in their appellate briefing in the *Mirfasihi II* appeal and, even then, devoted only two sentences to this objection. In their opposition briefs in the *Mirfasihi II* appeal, plaintiff and defendant each argued that, first, the petitioners had waived their FCRA objection by failing to raise it in the district court; and second, the value of the FCRA claim was minimal in any event. The petitioners and the other parties each discussed the FCRA objection briefly during oral argument in the *Mirfasihi II* appeal.

In *Mirasihi II*, the Seventh Circuit rejected the district court's approval of the revised settlement, but only on a narrow basis: The Seventh Circuit considered it appropriate for the district court to conduct a more thorough examination of applicable state law from all relevant states instead of sampling and discussing just a few states. The Seventh Circuit disposed of all objections that had been raised by the petitioners and remanded the settlement for a final analysis on this one issue. The effect of this decision was to confirm that the petitioners had waived their FCRA objections.

Subsequently, in the *Mirfasihi III* appeal, the petitioners once again tried to raise their FCRA

objection and arguments. Again plaintiff and Fleet each opposed it based on that the petitioners had previously waived this argument and also it was wrong on the merits.

In *Mirfasihi III*, the Seventh Circuit specifically addressed petitioners' FCRA objection as follows: "We did not discuss the Act in our second opinion, but implicitly excluded it from further consideration by stating that 'on remand, the district court should consider and analyze the full cross-section of potentially applicable *state* law.'" *Mirfasihi III*, Pet. App. 6 (emphasis in the original). *See United States v. Husband*, 312 F.3d 247, 251 (7th Cir. 2002), *cert. denied*, 539 U.S. 961 (2003) (a party "'cannot 'use the accident of remand as an opportunity to reopen waived issues'"), *quoted in Mirfasihi III*, Pet. App. 5-6; *accord*, *United States v. Radmall*, 340 F.3d 798, 802 (9th Cir. 2003) (same quote).

In addition, during oral argument in the *Mirfasihi III* appeal, the petitioners specifically asked the Seventh Circuit panel for a post-argument opportunity to show that they had raised their FCRA argument in the district court prior to *Mirfasihi II*. The Seventh Circuit granted them that additional opportunity and the petitioners submitted an additional brief, but their post-argument submission was inaccurate and misleading. The Seventh Circuit, in its *Mirfasihi III* opinion, commented with disfavor on the petitioners' "irresponsible litigation

tactics" including their "inaccurate and misleading statements in their ... post-argument submission ..." Pet. App. 10.

The Seventh Circuit has treated the petitioners more than fairly. There is nothing remarkable about the Seventh Circuit's decision to reject the petitioners' untimely FCRA objection and arguments and uphold the trial court's second approval of the revised settlement. There is no split of authority among the circuits concerning this issue. The petition should be denied.

II. Fleet Did Not Transmit Consumer Reports because It Reported Information Solely as To Its Own Transactions

Not only did the petitioners waive the sole issue on which they seek review in this Court, but the FCRA does not even apply to the facts of this case. The facts are that Fleet communicated only information as to its transactions or experiences between consumers and itself, which is expressly excluded from the FCRA's definition of a "consumer report." Nothing in the record supports the factual predicate for petitioners' FCRA argument.

In this case, unless Fleet conveyed "consumer reports," it cannot be liable under the FCRA. *E.g.*, *Ippolito v. WNS, Inc.*, 864 F.2d 440, 448 (7th Cir. 1988), *cert. dismissed*, 490 U.S. 1061 (1989) ("if the Special Service Reports are not 'consumer reports,'

then the FCRA does not cover any of WNS's actions"); *see also Houghton v. New Jersey Mfrs. Ins. Co.*, 795 F.2d 1144, 1149 (3rd Cir. 1986) ("[t]he statute requires one to divulge the report upon request only if the report qualifies as a 'consumer report' as defined by the statute").

The relevant portion of the definition of "consumer report" in the FCRA reads as follows:

> Exclusions. ... [T]he term "consumer report" does not include —
>
> (A) ... any —
>
> (i) ... information solely as to transactions or experiences between the consumer and the person making the report.

15 U.S.C. § 1681a(d)(2).

This exclusion means exactly what is says. For example:

> The "transactions and experiences" provision exempts from coverage any report based on the reporter's first-hand experience of the subject. Therefore, a retailing firm's disclosure of its own ledger experience with a customer or a bank's report of its own experience with its customers would not constitute a consumer report.

Hodge v. Texaco, Inc., 975 F.2d 1093, 1096 (5th Cir. 1992) (citations omitted). *Accord, Rush v. Macy's New York, Inc.*, 775 F.2d 1554, 1557 (11th Cir. 1985) ("[t]he information that Macy's provided to CBI was ... based solely on its own credit records of store transaction; thus, it cannot constitute a 'consumer report' under the FCRA").

Similarly, in a case where a "[b]ank had reported that Smith was delinquent in her Visa account," the court held:

> [T]he Bank is not acting as a "consumer reporting agency," within the meaning of the Fair Credit Reporting Act, because, *inter alia*, it has not furnished a "consumer report" as that term is defined in the Act. A "consumer report" does not include "any report containing information solely as to transactions or experiences between the consumer and the person making the report."

Smith v. First Nat'l Bank, 837 F.2d 1575, 1577, 1578 (11th Cir.) (per curiam), *cert. denied*, 488 U.S. 821 (1988).[2]

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[2] *Accord, Showalter v. Chase Manhattan/Providian*, 2005 U.S. Dist. Lexis 45465, *8 (N.D. Cal. 2005) (in a case involving credit cards, "[p]laintiffs allege only that Chase and MBNA reported to third parties information regarding transactions between defendants and plaintiff[;] [d]efendants did not, therefore, furnish a consumer report regarding plaintiff"); *Brown v. Chrysler Fin. Servs.*, 2004 U.S. Dist. Lexis 19390, *2, *12 (N.D. Ill. 2004) (dismissing

Applying this "transactions and experiences" exclusion to Fleet, there is nothing in the record that supports that Fleet transmitted anything other than its mortgagors' names, addresses, mortgage account numbers, and the like. All of this information comes directly from Fleet's own mortgage "transactions and experiences" with its customers. Therefore, the information that Fleet transmitted falls squarely within the exclusion in the statutory definition of consumer reports. As a result, the FCRA does not apply.

This is exactly what the Seventh Circuit observed in dictum in *Mirfasihi III*: "What Fleet sold the telemarketers was 'information solely as to transactions ... between the consumer [the Fleet mortgagor] and the person making the report [Fleet]." Pet. App. 7 (brackets and ellipsis in the original). This information is excluded from the definition of consumer reports.

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an FCRA claim in a case concerning a car buyer and a financing company because "the report at issue related to [no]thing other than the transaction between Brown and Chrysler"); *Borninski v. Williamson*, 2004 U.S. Dist. Lexis 29407, *8 (N.D. Tex. 2004) ("where a financial institution furnishes information based solely on its own experience with the consumer, the information is not a consumer report"); *Podell v. Citicorp Diners Club*, 859 F. Supp. 701, 705 (S.D.N.Y. 1994) (in a case involving credit cards, "the information passed by Diners Club ... cannot constitute a 'consumer report'[;] [t]he statute expressly excludes from its definition reports 'containing information solely as to transactions or experiences between the consumer and the person making the report'").

The petitioners misleadingly characterize *Mirfasihi III* as an unusual result that "[n]o circuit or district court to consider the scope of § 1681a(d)(2)(A)(i) has held ..." Pet. 10. And, "[w]hen faced with this question, the other circuits have concluded that the § 1681a(d)(2)(A)(i) exemption does not apply where at least some of the transmitted information was acquired outside of the direct relationship with the reporter." Pet. 10.

In making their arguments, the petitioners mislead the Court by presuming that a list of Fleet's mortgagors implicitly but necessarily carries with it all the credit information that was in the credit report on which Fleet relied when it first granted the loan. *E.g.*, Pet. 10-15. The petitioners argue that disclosing the mere existence of a loan conveys that Fleet determined the borrower was creditworthy, which is tantamount to disclosing all the credit information on which Fleet relied. *Id.*

It is the petitioners, not the Seventh Circuit, that are attempting to break from well-established case law. If the petitioners' argument were correct, in all the cases cited above in which a company conveyed that it had extended credit to someone, the disclosure would have been a "consumer report." But the courts in all those cases held just the opposite: the disclosure was **not** a consumer report.

In support of their novel theory, the petitioners argue that "lists of names and addresses

of individuals who meet specific criteria such as possession of ... mortgages" constitute consumer reports. Pet. 14-15 (ellipsis in the original). For this proposition, they cite *Trans Union Corp. v. Federal Trade Commission*, 245 F.3d 809, 812 (D.C. Cir.), *rehearing denied by* 267 F.3d 1138 (D.C. Cir. 2001), *cert. denied*, 536 U.S. 915 (2002). But the petitioners fail to recognize the key difference between *Trans Union* and *Mirfasihi III*: In *Trans Union*, the company selling the lists was a national credit reporting agency that had no first-hand transactions or experiences with the consumers identified in its reports. Therefore, Trans Union's lists did not qualify for the "transactions or experiences" exclusion. In contrast, in *Mirfasihi*, Fleet was transmitting lists of **its own** mortgage customers, which fits squarely within the exclusion. *Trans Union* is inapposite.[3]

In summary, the petitioners do not point to a single case that supports their contrived theory concerning the "transactions or experiences" exclusion in the definition of consumer reports. The Seventh Circuit got it right in its dictum in *Mirfasihi III*. The Seventh Circuit's observation about this exclusion is well supported by a long list of cases,

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[3] The objectors cite 16 CFR Part 600 Appendix Commentary on § 604(3)(A) at ¶ 6 for a similar proposition — that a "prescreened list" is a consumer report. The commentary appears to be directed toward companies like Trans Union. There is nothing in the record to suggest that Fleet conducted any prescreening.

and there is no circuit split as to how this exclusion is to be applied.[4]

II. The Revised Settlement Has Been Scrutinized Multiple Times and Is Not Abusive

The petitioners, in Section III of their petition (starting at page 20), list a series of perceived abuses in the revised settlement and the opinions approving it. All of these issues are beyond the scope of the question presented for review and should be rejected out of hand. Nonetheless, plaintiff will briefly identify the petitioners' errors.

The petitioners assert that a settlement must meet "some minimum standard of fairness ..." Pet. 20 (citing *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 619-620 (1997)). However, the district court **did** conclude that the settlement was fair. Pet. App. 29 (the revised settlement "is fair, reasonable, and adequate and it is again approved"). What the petitioners really mean is that the this Court should substitute petitioners' opinions for those of the district court and Seventh Circuit, which have wide latitude in approving and affirming settlements. This argument has no weight.

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[4] The Seventh Circuit also concluded that Fleet was not a "consumer reporting agency" within the meaning of the FCRA. *Mirfasihi III*, Pet. App. 7.

The petitioners next assert that the information-sharing class received nothing. Pet. 22. But the district court concluded otherwise. *E.g.*, Pet. App. 29 ("[t]he litigation value of their claims is minimal[;] ... the Settlement disgorges FMC of the profits that it made selling the plaintiffs' information and requires it to pay at least $243,000 to an organization that specializes in education and protection of privacy rights, which is likely to provide a benefit to the members of the class"). Again, the petitioners seek to substitute their judgment for the district court's.[5]

The petitioners trail off with a number of other perceived violations that the Seventh Circuit, the district court, or counsel for one or the other of the classes committed, all of which the district court and the Seventh Circuit have rejected multiple times. None of their arguments are within the scope

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[5] The objectors also misleadingly imply that the district court's fee-and-expense award was based solely on the relief that the information-sharing class obtained. *See* Pet. 1, 22. This is false. The fee-and-expense award resulted from the relief obtained for the telemarketing class as well. The district court held that the total relief justified the award. *See Mirfasihi*, 2005 U.S. Dist. Lexis 16701, *42 (N.D. Ill. 2005) (award "is a reasonable amount under both the lode-star and percentage-of-funds methods"); Pet. App. 29 (incorporating 2005 decision into 2007 decision).

of this petition or have any merit.[6] The petitioners show no overriding national importance in any of these issues and no inter-circuit conflict.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: May 4, 2009

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[6] The petitioners insinuate that the new counsel the telemarketing class obtained following *Mirfasihi I* was not "new" and instead negotiated the original settlement. Pet. 25. This argument is simply false and not supported by the record. To the contrary, the district court found just the opposite of what the petitioners contend. *See Mirfasihi*, 2005 U.S. Dist. Lexis 16701 at *32 ("Mr. Cantor ... was not involved in the negotiations over the initial settlement agreement").